

REMARKS

The Board of Patent Appeals and Interferences affirmed the Examiner's decision on a new ground of rejection pursuant to 37 C.F.R. § 41.50(b). In response, Applicants submit the amendment herein and request that prosecution be reopened to have the matter reconsidered by the Examiner. Applicants thus request that this application be remanded to the Examiner.

The Board affirmed the rejection based on a new finding that extruding is a type of molding method and that J-128's melt spun bristles constitute "molded" bristle. Although Applicants do not agree, Applicants amend the claims to clarify that the "molded elastomeric element" are "injection molded." Support for this amendment can be found, for example, on page 3, line 25, and page 10. Melt spinning is not an injection molding technique, but an extrusion technique. Appellants have found that injection molding elastomeric bristles provides bristles that are gentle and that have surprisingly good wear resistance as compared to extrusion. J-128 does not teach or suggest an injection molded elastomeric element. A person having ordinary skill in the art would understand that "injection molded" is a structural distinction since it is known to persons of ordinary skill in the art that molding yields a different *microstructure* than extruding, even though the extruded and injection molded parts may *look* similar from a *macroscopic* point of view. Moreover, there is no motivating disclosure in J-128 that would have led one of ordinary skill in the art to injection mold an elastomeric element rather than melt spinning or melt spinning and drawing the elastomeric element.

Moreover, Applicants maintain that the rejection is in error because J-128 does not disclose or suggest that the elastomeric material should have a Shore A hardness of less than 55, for substantailly the reasons outlined in the Appeal Brief. There is not any recognition in J-128 that the elastomeric material should have a Shore A hardness of less than 55. The Board improperly asserts that using the claimed Shore A hardness "appears to be the product not of innovation but of ordinary skill and common sense." There is no evidence of record that

suggests that one having ordinary skill in the art would find it "common sense" to use a material having the claimed Shore A hardness. The cited cases of *In re Leshin*, *In re Boesch*, and *In re Aller* are not on point. *In re Leshin* held that it is obvious to select a known material based upon its known intended uses. Neither the Board nor the Examiner, however, has established that any known material having the claimed Shore A hardness as being known for use as an elastomeric element of a toothbrush. *In re Boesch* and *In re Aller* involve the optimizing result-effective variables, but a result-effective variable must be identified as such in the art. Again, neither the Board nor the Examiner has cited any prior art identifying Shore A hardness as result-effective variable within the toothbrush art. The unsupported allegation of "common sense" is not a legally sufficient basis for establishing *prima facie* case of obviousness.

No fee is believed to be due. However, please apply any applicable charges or credits to deposit account 06-1050.

Respectfully submitted,

Date: February 15, 2011

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